(1)

Supreme Court, U.S.
FILED

No. 011014 DEC 4 2001

OFFICE OF THE CLERK

In The
Supreme Court of the United States

RICHARD M. STUMBO,

Petitioner,

v.

DYNCORP PROCUREMENT SYSTEMS, INCORPORATED, f/k/a DynCorp Aerospace Operations, Incorporated; DYNCORP AEROSPACE OPERATIONS, INCORPORATED; DYNCORP AEROSPACE OPERATIONS, (U.K.), LIMITED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Ann K. Crenshaw
Counsel of Record
Thomas M. Lawson
LAWSON AND SILEK, P.L.C.
160 Exeter Drive
Suite 103
Post Office Box 2740
Winchester, Virginia 22604
(540) 665-0050

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

53pp

QUESTIONS PRESENTED

1. Is a party with hypertension precluded by summary judgment from recovery under Federal Rule of Civil Procedure 56 under the Americans With Disabilities Act, 42 U.S.C. § 2117(a) based on a disability or perceived disability which significantly limits one or more of the major life activities, where he is disqualified from the class of employment of an International Police Monitor?

2. Is a party with hypertension per se precluded by summary judgment from recovery under Federal Rule of Civil Procedure 56 from recovery under the Americans With Disabilities Act, 42 U.S.C. § 2117(a) based on a disability or perceived disability which significantly limits one or more of the major life activities, where his hypertension is controlled by medication?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the Court below, as required by Rule 14.1(b) of the Rules of the United States Supreme Court:

1. Richard M. Stumbo,
   Plaintiff/Appellant/Petitioner;

2. DynCorp Procurement Systems, Incorporated,
   Defendant/Appellee;

3. DynCorp Aerospace Operations, Incorporated,
   Defendant/Appellee;

4. DynCorp Aerospace Operations (U.K.), Ltd.,
   Defendant/Appellee;

5. Ann K. Crenshaw, Attorney for the
   Plaintiff/Appellant/Petitioner;

6. Michelle L. Bodley, Attorney for the
   Defendants/Appellees;

7. Steven W. Ray, Attorney for the
   Defendants/Appellees.

CORPORATE DISCLOSURE STATEMENT

DynCorp Procurement Systems, Incorporated, DynCorp Aerospace Operations, Incorporated and DynCorp Aerospace Operations (U.K.), Ltd. have parent corporations. The parent is DynCorp Aerospace Operations, Incorporated; the grandparent is DynCorp Technical Services, Incorporated; and the great-grandparent is DynCorp. There is no publicly held company that owns ten percent (10%) or more of the company's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS ENTERED BELOW 1

JURISDICTION STATEMENT 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

A. PROCEDURAL HISTORY 4

B. STATEMENT OF FACTS 5

REASONS FOR GRANTING THE WRIT 9

I. CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE FOURTH CIRCUIT'S REVIEW UNDER THE AMERICANS WITH DISABILITIES ACT OF A DISABILITY OR PERCEIVED DISABILITY WHICH SIGNIFICANTLY LIMITS ONE OR MORE OF THE MAJOR LIFE ACTIVITIES FROM THE CLASS OF JOBS OF AN INTER-NATIONAL POLICE MONITOR IS INCONSISTENT WITH APPLICABLE LAW. 9

II. CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE FOURTH CIRCUIT'S PER SE DENIAL OF A CLAIMANT WITH HYPERTENSION UNDER THE AMERICANS WITH DIS-ABILITIES ACT OF A DISABILITY OR PERCEIVED DISABILITY WHICH SIGNIFICANTLY LIMITS ONE OR MORE OF THE MAJOR LIFE ACTIVITIES WHERE THE CLAIMANT'S HYPERTENSION IS CONTROLLED BY MEDICATION IS INCONSISTENT WITH APPLICABLE LAW 14

CONCLUSION 23

APPENDIX .....App. i

TABLE OF AUTHORITIES

Page(s)

Cases:

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S.Ct. 2505 (1986)
477 U.S. at 252, 106 S.Ct. at 2509 ..... 9, 10

Andress v. National Pizza Company International, Inc.,
984 F. Supp. 475, 483 (S.D. Miss. 1997) 11, 17

Barnett v. U.S. Air, Inc.,
228 F.3d 1105, 1111 (9th Cir. 2000) *cert. granted, in part,* 121 S.Ct. 1600, 149, L.Ed.2d, 467 (2001) 17

Bartlett v. New York State Board of Law Examiners, et al.,
226 F.3d 69 (2d Cir. 2000) 12, 19

Beale v. Hardy,
769 F.2d 213, 214 (4th Cir. 1985) 10

Benson v. Northwest Airlines, Inc.,
62 F.3d 1108, 1112 (8th Cir. 1995) 10

Bey v. Bolger,
540 F. Supp. 910 (E.D.Pa. 1982) 15

Bolton v. Scrivner, Inc.,
36 F.3d 939, 943 (10th Cir. 1994) *cert. denied,*
513 U.S. 1152, 115 S. Ct. 1104 (1995) 13

Bridges v. City of Bossier,
92 F.3d 329 (5th Cir. 1996) *cert. denied*,
519 U.S. 1093 117 S.Ct. 770,
136 L.Ed.2d 715 (1997) 23

Chandler v. City of Dallas,
2 F.3d 1385, 1396 (5th Cir. 1996) *cert. denied*,
511 U.S. 1011, 114 S.Ct. 1386 (1994) 12

Coleman v. Southern Pacific Transportation Co.,
997 F. Supp. 1197 (D.Ariz. 1998) 22, 23

Colwell v. Suffolk Co. Police Dept.,
158 F.3d 635, 643 (2d Cir. 1998) 17

Corrigan v. Perry,
1998 WL 129929 (4th Cir. 1998) 9, 10

Daley v. Koch,
892 F.2d 212, 215-16 (2d Cir. 1989) 21

Deghand v. Wal-Mart Stores, Inc.,
926 F. Supp. 1002 (D. Kans. 1996) 12, 13

DeMar v. Car-Freshner Corp.,
49 F. Supp.2d 84, 90 (N.D.N.Y. 1999) 11, 21

Fjellestad v. Pizza Hut of America, Inc.,
188 F.3d 944, 949 (8th Cir. 1999) 17, 19

Francis v. City of Meridan,
129 F.3d 281, 284 (2d Cir. 1998) 21

Haysman v. Food Lion, Inc.,
893 F. Supp. 1092, 1101 (S.D.Ga.1995).....17

Hutchinson v. United Parcel Serv., Inc.,
883 F. Supp. 379, 390-91 (N.D. Iowa 1995).....11

Jasany v. U.S.P.S.,
755 F.2d 1244, 1249 (6th Cir. 1985).....17

Jones v. Wellham,
104 F.3d 620, 626 (4th Cir. 1997).....9

Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,
475 U.S. 574, 587, 106 S. Ct. 1348,
89 L.Ed.2d 538 (1986).....9

McKenzie v. Donvala,
242 F.3d 967 (10th Cir. 2001).....10, 11

Murphy v. UPS, Inc.,
527 U.S. 516, 119 S. Ct. 2133,
144 L.Ed.2d 484 (1999).....15, 19

Oswalt v. Sara Lee Corp.,
74 F.3d 91, 92 (5th Cir. 1996).....15

Reeves v. Johnson Controls World Servs., Inc.,
140 F.3d 144, 151 (2d Cir. 1998).....11

Ryan v. Grae & Rybicki,
135 F.3d 867, 872 (2d Cir. 1998).....11

Sartor v. Arkansas Natural Gas Corp.,
321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944).....9

Smith v. Midland Brake, Inc.,
180 F.3d 1154, 1161-62 (10th Cir. 1999) *on remand*,
98 F. Supp. 2d 1233 (D.Kan. 2000) 17

Stumbo v. DynCorp Technology Services, Inc.,
130 F. Supp. 2d 771, 774 (W.D. Va. 2001) 16

Sutton v. United Airlines, Inc.,
527 U.S. 471, 119 S. Ct. 2139,
144 L.Ed.2d 450 (1999) 15, 19, 20, 21

Webb v. Garelick Mfg. Co.,
94 F.3d 484, 488 (8th Cir. 1996) 17

Welsh v. City of Tulsa,
977 F.2d, 1415, 1419 (10th Cir. 1992) 17

Young v. Bank of Boston Connecticut,
1995 WL 908616 (D.Conn. 1995) 21

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 12101, et seq. 4, 5

42 U.S.C. § 12102(2) 1, 11

42 U.S.C. § 12101(2)(A) 1, 4

42 U.S.C. § 12102(2)(B) 1

42 U.S.C. § 12102(2)(C) 1, 4

42 U.S.C. § 12111(8) 18

42 U.S.C. § 12111(9) 18

42 U.S.C. § 12112(a) 10

42 U.S.C. § 12112(b) 4

42 U.S.C. § 2117(a) 23

Rules:

Fed. R. Civ. P. 56(b) 3

Fed. R. Civ. P. 56(c) 4, 9, 16

Regulations:

29 C.F.R. § 1630.2(j) 2

29 C.F R. § 1630.2(j)(i) 2

29 C.F.R. § 1630.2(j)(ii) 2

29 C.F.R. § 1630.2(j)(ii)(A) 2

29 C.F.R. § 1630.2(j)(ii)(B) 3

29 C.F.R. § 1630.2(j)(ii)(C) 3

29 C.F.R. § 1630.2(j)(3)(i) (1999) 12

29 C.F.R. § 1630.2(j)(3)(ii)(A) 12

29 C.F.R. § 1630.2(j)(3)(ii)(B) 12

29 C.F.R. § 1630.2(j)(3)(ii)(C) 12

29 C.F.R. § 1630.210 18

OPINIONS AND ORDERS ENTERED BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported. It is attached as an appendix. (App. at 1).[1] The opinion of the United States District Court for the Western District of Virginia is published at 130 F.Supp.2d 771 and is attached as an appendix. (App. at 5).

JURISDICTION STATEMENT

The decision of the United States Court of Appeals for the Fourth Circuit affirming the order of the United States District Court for the Western District of Virginia granting summary judgment was entered on September 5, 2001. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute at issue in this case is the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. § 12102(2) which states:

> "The term 'disability' means, with respect to an individual - (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

---

[1] Citations to the Appendix will be referred to as "App. at ___".

Title 29 of the Code of Federal Regulations, 1630.2(j) provides as follows:

> With respect to the major life activity of working -
>
> (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
>
> (ii) In addition to the factors listed in paragraph (j)(2) of this section, the following facts may be considered in determining whether an individual is substantially limited in the major life activity of "working":
>
> > (A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Rule 56(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

Fed. R. Civ. P. 56(b).

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . ."

Fed. R. Civ. P. 56(c)

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner (hereinafter "Mr. Stumbo") filed a Complaint with the Equal Employment Opportunity Commission (hereinafter "EEOC") in early 1997. On July 7, 1998, the EEOC issued its Determination. (App. at 12). Mr. Stumbo subsequently brought a suit under the Americans With Disabilities Act, 42 U.S.C. § 12101, et seq. ("ADA"), alleging three (3) claims: that he was subjected to discrimination on the basis of disability, § 12101(2)(A); that DynCorp Procurement Systems, Inc., DynCorp Aerospace Operations, Inc. and DynCorp Aerospace Operations (U.K.), Ltd. (hereinafter collectively referred to as "DynCorp") improperly regarded him as disabled, § 12102(2)(C); and that DynCorp failed to provide a reasonable accommodation for the hypertension, § 12112(b). DynCorp has moved for a summary judgment on all

counts. The United States District Court for the Western District of Virginia granted DynCorp summary judgment on all counts on January 29, 2001. (App. at 5).

The Notice of Appeal was timely filed on February 7, 2001. The United States Court of Appeals for the Fourth Circuit affirmed the order of the United States District Court for the Western District of Virginia on September 5, 2001. (App. at 1).

B. STATEMENT OF FACTS

Petitioner is a Marine Corps veteran of the Vietnam War and is a retired District of Columbia police officer. Mr. Stumbo alleged that DynCorp discriminated against him by failing to hire him for the position of International Police Monitor ("IPM") in Bosnia because of a disability or a perceived disability in violation of the Americans With Disabilities Act, 42 U.S.C. § 12101, et seq. (hereinafter the "ADA" or "the Act"). Although his physical impairment, hypertension, continues to be successfully treated with prescription medication, Mr. Stumbo alleged that he was deemed by DynCorp to be medically incapable of performing major life activities which foreclosed him from the position of IPM. Additionally, DynCorp perceived Mr. Stumbo as disabled. The United States District Court for the Western District of Virginia wholly adopted DynCorp's assertation of the facts and totally dismissed the facts as put forth by Mr. Stumbo. The United States District Court for the Western District of Virginia entered summary judgment in favor of the Defendants.

In March of 1996, Mr. Stumbo forwarded an original resume to DynCorp. On April 30, 1996, Mr. Stumbo received a United States State Department Request for Biological Data from DynCorp which he duly completed and returned. On August 12, 1996, Mr. Stumbo was notified by DynCorp that he had been selected for the position of IPM. He received the package from DynCorp, including physical examination forms and related information regarding the position, which contained information which would enable him to prepare to depart for Bosnia.

As directed, Mr. Stumbo obtained a physical from his personal physician, Dr. Mark Vickers. Dr. Vickers rated Mr. Stumbo a "category 1" - fit for all physical and manual duties. Dr. Vickers prescribed six (6) months of medication for treatment of his hypertension following the DynCorp recommendations as to the appropriate duration of the prescription contained in the DynCorp employment package.

On September 6, 1997, DynCorp, through its employee, Austin Bryan, advised Mr. Stumbo via telephone that there was a problem with his physical examination. On September 9, 1997, Mr. Stumbo was advised by DynCorp that he was rejected for the position of IPM because he had "high blood pressure" and "hypertension." As such, DynCorp found Mr. Stumbo to be medically incapable of performing the position of IPM in Bosnia.

Later, through the discovery process, it was learned that DynCorp withdrew the offer of IPM to Mr. Stumbo after his medical documents revealed that he had hypertension, even though Mr. Stumbo's doctor has provided medical clearance for the assignment as

an IPM. DynCorp never requested a medical examination by its own doctor or doctors. DynCorp perceived Mr. Stumbo to be substantially limited in his ability to perform the duties of IPM because of a perceived impairment. DynCorp placed Mr. Stumbo in the category of an individual who did not meet the job requirements of an IPM because of his hypertension.

Mr. Stumbo filed a Complaint with the EEOC in early 1997. The EEOC conducted a thorough investigation and on July 7, 1998, issued its Determination (App. at 12). The EEOC found that all requirements for coverage under the Act had been met. The EEOC correctly concluded that DynCorp withdrew the offer of IPM because it found Mr. Stumbo to be medically incapable of performing the job because of his hypertension.

The EEOC correctly noted that DynCorp never requested a medical examination by its own doctor, even though Dr. Vickers, Mr. Stumbo's personal physician, concluded that Mr. Stumbo was medically capable of performing the job. The District Director of the EEOC also determined that DynCorp perceived Mr. Stumbo to be substantially limited in his ability to perform the duties of IPM because of his physical impairment, and thus, placed Mr. Stumbo in the category of an individual who did not meet the minimum qualifications set out in DynCorp's contract with the United States State Department. In fact, the District Director of the EEOC concluded that there was reasonable cause to believe Mr. Stumbo was denied employment because of his record of disability or because he was regarded as a person with a disability.

DynCorp discriminated against Mr. Stumbo by failing or refusing to hire him because of his record of treatment for hypertension, or because Mr. Stumbo was regarded as a person with a disability. DynCorp perceived that Mr. Stumbo was medically incapable of performing major life activities required of IPMs such as, but not limited to, walking, running, lifting, climbing stairs, personal survival skills, ability to adapt to cold weather and defense of his personal safety. DynCorp believed that Mr. Stumbo was medically incapable of performing the broad range of jobs which include any non-sedentary activity such as walking, running, climbing stairs or any form of physical exertion. In particular, DynCorp placed Mr. Stumbo in the category of an individual who did not meet the minimum qualifications for the specific position of IPM.

The deposition of Dr. Peter McDougall, a physician retained by DynCorp, indicates he advised DynCorp that Mr. Stumbo was medically incapable of performing the job, and that he perceived Mr. Stumbo as medically incapable of performing the job. The testimony of Dr. McDougall demonstrates that DynCorp's own physician believed that it is appropriate to assess a candidate's body mass and other physical attributes prior to reaching a conclusion regarding medical incapacity. As such, DynCorp should have followed its own internal procedures and requested an independent review of Mr. Stumbo. DynCorp violated its own procedures which allowed for follow-up by the candidate's own doctor. In this instance, the follow-up correspondence from Dr. Vickers was never reviewed by Dr. McDougall or DynCorp. Succinctly, DynCorp categorized Mr. Stumbo as disabled without the benefit of review or examination.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE FOURTH CIRCUIT'S REVIEW UNDER THE AMERICANS WITH DISABILITIES ACT OF A DISABILITY OR PERCEIVED DISABILITY WHICH SIGNIFICANTLY LIMITS ONE OR MORE OF THE MAJOR LIFE ACTIVITIES FROM THE CLASS OF JOBS OF AN INTERNATIONAL POLICE MONITOR IS INCONSISTENT WITH APPLICABLE LAW.

It is a well settled legal principal that a decision granting summary judgment shall be reviewed by the court on a *de novo* basis. Jones v. Wellham, 104 F.3d 620, 626 (4th Cir. 1997). Under the Federal Rules of Civil Procedure at Rule 56(c), the applicable standard is "whether 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Corrigan v. Perry, 1998 WL 129929 (4th Cir. 1998). A court should not grant summary judgment unless there is no genuine issue as to a material fact). Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944).

Additionally, the evidence shall be viewed in a light most favorable to the non-moving party, in this case, Mr. Stumbo. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986). The Court must consider on the record as a whole. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Summary

judgment is only appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Corrigan, supra. 1998 WL 129929. Further, a genuine issue of material fact cannot be created through "mere speculation or the building of inference upon another." Id. *citing* Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985). Summary judgment is only appropriate where the evidence "is so one-sided that one party must prevail as a matter of law." Anderson, supra., 477 U.S. at 252, 106 S.Ct. at 2509. Moreover, "the non-movant is given 'wide berth to prove a factual controversy exists.'" McKenzie v. Donvala, 242 F.3d 967 (10th Cir. 2001). (Citations omitted).

The ADA of 1990 prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability. Specifically, the ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). To establish a prima facie case of employment discrimination under the ADA, the plaintiff must establish that (1) he is disabled within the meaning of the Act; (2) he is qualified to perform the essential functions of the job either with or without accommodation; and (3) he has suffered adverse employment action because of the disability. See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995).

"The ADA's definition of a 'qualified individual with a disability includes an individual who can perform the essential functions of the job [s]he holds or desires.'" (emphasis in original). McKenzie v. Donvala, supra., at 242 F.3d at 974. Moreover, the ADA covers applicants as well as employees. Id. at 974. The ADA protects not just the actually disabled, but also those who are merely regarded as disabled. Indeed, the ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). "The determination of whether an individual is disabled under the ADA should be made on an individualized, case-by-case basis." DeMar v. Car-Freshner Corp., 49 F.Supp.2d 84, 90 (N.D.N.Y. 1999). *See also* Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 151 (2d Cir. 1998); Ryan v. Grae & Rybicki, 135 F.3d 867, 872 (2d Cir. 1998) ("[T]he determination whether an impairment 'substantially limits' a major life activity is fact specific.".)

This determination depends upon whether the disability or impairment substantially limits a "major life activity." In all cases, a disability or impairment, real or perceived, must be substantially limiting, thereby foreclosing generally the type of employment involved, not just a narrow range of job tasks. *See also* Andress v. National Pizza Company International, Inc., 984 F.Supp. 475, 483 (S.D. Miss. 1997); Hutchinson v. United Parcel Serv., Inc., 883 F.Supp. 379, 390-91 (N.D. Iowa 1995). Such a determination of disability depends upon the effect the impairment has upon a particular individual rather than the name or diagnosis of the

impairment. *See also* Deghand v. Wal-Mart Stores, Inc., 926 F.Supp. 1002 (D. Kans. 1996); Chandler v. City of Dallas, 2 F.3d 1385, 1396 (5th Cir. 1996), cert. denied, 511 U.S. 1011, 114 S.Ct. 1386 (1994) ("[T]he effect of a given type of impairment, both on major life activities in general and on a person's ability to perform specific tasks, can vary widely from individual to individual.".)

The EEOC regulations provide that an individual is substantially limited with respect to working if he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i) (1999). Moreover, the regulations further elaborate on what is meant by a "class of jobs." Id. § 1630.2(j)(3)(ii)(B), or a "broad range of jobs in various classes." Id. § 1630.2(j)(3)(ii)(C), limiting the inquiry to the geographical area "to which the individual has reasonable access." Id. § 1630.2(j)(3)(ii)(A). With respect to "a class of jobs," a court must consider "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities." Id. § 1630.2(j)(3)(ii)(B). Bartlett v. New York State Board of Law Examiners, et al., 226 F.3d 69 (2nd Cir. 2000). There are a number of relevant factors in considering whether the impairment substantially limits an individual's ability to work:

(1) the geographic area to which the individual has reasonable access;

(2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or

abilities, within the geographical area, from which the individual is also disqualified because of the impairment (class of jobs); or

(3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Deghand, supra, 926 F.Supp. at 1012-13. *See also* Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir. 1994), cert. denied, 513 U.S. 1152, 115 S.Ct. 1104 (1995).

The general type of employment in this case is that of an International Police Monitor described by the United Nations and United States State Department. The job of IPM is a specific type or class of employment. An IPM is not a class of jobs which can be equated with that of a basic security position, such as a night watchman. An IPM is a unique type of employment utilizing a wide range of skills encompassing not only skills related to the police or security professions, but also including a component of para-military skills. The universe of availability for such positions is dictated by the international political environment. At the time Mr. Stumbo was denied employment, there were only two (2) geographic areas of the world in which an IPM position was available - Bosnia and Haiti. The Haitian position required that the applicant speak French in a Creole dialect, a skill which Mr. Stumbo did not possess. Accordingly, the universe of the class of jobs available to Mr. Stumbo as

an IPM was extremely small. Each of these positions for the wide category of IPM were, in DynCorp's opinion, jobs for which a person with hypertension would not be hired.

II. CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE FOURTH CIRCUIT'S PER SE DENIAL OF A CLAIMANT WITH HYPERTENSION UNDER THE AMERICANS WITH DISABILITIES ACT OF A DISABILITY OR PERCEIVED DISABILITY WHICH SIGNIFICANTLY LIMITS ONE OR MORE OF THE MAJOR LIFE ACTIVITIES WHERE THE CLAIMANT'S HYPERTENSION IS CONTROLLED BY MEDICATION IS INCONSISTENT WITH APPLICABLE LAW.

The United States District Court for the Western District of Virginia held that Mr. Stumbo failed to present any evidence that his hypertension substantially limits his ability to perform a major life activity. However, Mr. Stumbo has clearly and sufficiently alleged that he is disabled within the meaning of the ADA. Mr. Stumbo suffers a physical impairment - hypertension. Untreated, hypertension may result in cardiovascular disease, cardiac arrest, stroke, organ damage such as kidney failure, and other physical ailments. While Mr. Stumbo has been able to control his hypertension with medication, he risks suffering complications and hospitalization without appropriate medication. But as noted by his physician, Dr. Vickers, Mr. Stumbo's hypertension is "well controlled with therapy" contingent upon Mr. Stumbo treating his condition with two prescribed medications. DynCorp's determination that Mr. Stumbo was

incapable or medically unsuited to perform IPM duties, particularly in Bosnia, is based upon the presumption that while in such environments, Mr. Stumbo would be unable to get his needed medications.

The United States District Court for the Western District of Virginia held that persons suffering from hypertension when controlled by medication are not disabled per se and therefore, not covered by the ADA. In fact, DynCorp contends that the Supreme Court's rulings in Sutton v. United Airlines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) and Murphy v. UPS, Inc., 527 U.S. 516, 119 S.Ct. 2133, 144 L.Ed.2d 484 (1999), stand for the supposition that hypertension generally cannot be a "disability." To the contrary, the determination regarding disability under the ADA is fact-specific and does not preclude the use of medications or corrective devices. This Court has stated that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures - both positive and negative - must be taken into account when judging whether that person is 'substantially limited' in a major life activity." Sutton, supra, 527 U.S. at 488, 119 S.Ct. 2139. The use of corrective devices or mitigating measures "does not, by itself, relieve one's disability." Sutton, supra, 527 U.S. at 488, 119 S.Ct. at 2149. *See also* Oswalt v. Sara Lee Corp., 74 F.3d 91, 92 (5th Cir. 1996) ("We do not imply that high blood pressure in general can never be a 'disability,' as defined by the statute."); Bey v. Bolger, 540 F.Supp. 910 (E.D.Pa. 1982) (finding that plaintiff's hypertension and hypertensive cardiovascular disease made it impossible to perform his job duties without endangering his own health and safety). Accordingly, the United States District Court for the Western District

of Virginia should have considered the specific factual issues of this particular case instead of a blanket holding that Mr. Stumbo was not disabled " . . . under the ADA, as his condition is correctable via medication." (App. at 11). Stumbo v. DynCorp Technology Services, Inc., 130 F.Supp.2d 771, 774 (W.D. Va. 2001).

More importantly, DynCorp perceived Mr. Stumbo to be "substantially limited" in his ability to perform duties as law enforcement and logistics personnel as a result of his hypertensive condition. DynCorp stated that they determined Mr. Stumbo's hypertensive condition disqualified him from successfully performing his duties within the "hazardous conditions of a post-war environment" where electricity, running water, food and medical supplies were not allegedly readily available. This determination by DynCorp contemplated that Mr. Stumbo's hypertension would not be treated with medication, suggesting that Mr. Stumbo may not have access to medication with which he controls his condition. Therefore, the analysis of Mr. Stumbo's hypertensive condition must be examined in totality - with and without medication - in determining whether he qualifies as disabled under the ADA. Clearly, based upon DynCorp's own admissions, DynCorp believed and found that Mr. Stumbo suffers from an impairment which is substantially limiting. It follows that the Trial Court cannot rule on a summary basis pursuant to Federal Rule 56(c) without considering the facts as presented by Mr. Stumbo.

"[T]he ADA is concerned with preventing substantial personal hardship in the form of significant reduction in a person's real work opportunities."

Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 949 (8th Cir. 1999); Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996). In analyzing whether plaintiff is substantially limited in the ability to work, "the kinds of jobs from which the impaired individual is disqualified must be carefully considered." Colwell v. Suffolk Co. Police Dept., 158 F.3d 635, 643 (2d Cir. 1998) (citations omitted). As previously stated, the factors in considering whether the plaintiff is substantially limited include "(1) the number and type of jobs from which the impaired individual is disqualified, (2) the geographical area to which the individual has reasonable access, and (3) the individual's job expectations and training." Welsh v. City of Tulsa, 977 F.2d, 1415, 1419 (10th Cir. 1992) (quoting Jasany v. U.S.P.S., 755 F.2d 1244, 1249 (6th Cir. 1985)).

Under the ADA, the disabled individual must be able to perform essential functions required of the job, with or without reasonable accommodation. "Essential functions" are "fundamental job duties of the position in question." Andress, supra, 984 F.Supp. at 484 (quoting Haysman v. Food Lion, Inc., 893 F.Supp. 1092, 1101 (S.D.Ga.1995)). The courts have held that the statutory definition of a "qualified individual" includes individuals who can perform the "essential functions" of a position with or without reasonable accommodation which the individual either "holds or desires." Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1111 (9th Cir. 2000) cert. granted, in part, 121 S.Ct. 1600, 149, L.Ed.2d, 467 (2001). *See also* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1161-62 (10th Cir. 1999), on remand, 98 F.Supp.2d 1233 (D.Kan. 2000).

"Reasonable accommodation" may include "any change within the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. §1630.210. *See also* 42 U.S.C. §12111(9). The ADA prohibits employers from discriminating against a disabled employee by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. §12111(8).

Here, Mr. Stumbo sought a position with DynCorp to work as law enforcement and logistics personnel, specifically International Police Monitor, as part of the United Nations International Police Task Force (IPTF) stationed in Bosnia. It is important to note that pursuant to a contract with the United States State Department, DynCorp provides law enforcement and logistics personnel in numerous locations throughout the world. Despite Dr. Vickers' assessment that Mr. Stumbo was "fit for all physical and manual duties," DynCorp unilaterally determined after a cursory review of Mr. Stumbo's application and without the benefit of a follow-up physical examination, that Mr. Stumbo's weight, smoking and hypertension prevented him from performing the essential tasks required. There was no follow-up of this decision as was the DynCorp normal procedure.

It is undisputed that Mr. Stumbo has the required skills and experience to perform the essential duties of IPM with the reasonable accommodation of

allowing access to hypertension medication. The only necessary accommodation was that DynCorp make the needed hypertension medication accessible to Mr. Stumbo while overseas. In fact, Mr. Stumbo had made arrangements to take sufficient medication with him to Bosnia. Such an accommodation would be neither expensive nor difficult as similar accommodations had been afforded to other employees of DynCorp. Therefore, DynCorp cannot successfully argue that this accommodation would generate an undue burden upon DynCorp.

In light of the above facts, it is apparent that Mr. Stumbo's hypertension, weight and tobacco use substantially limited his employment opportunities as an IPM. The evidence indicates that DynCorp refused to consider Mr. Stumbo for any IPM positions whether in Bosnia, Haiti or elsewhere, thereby resulting in a significant restriction. To qualify as a significant restriction, it is not necessary that Mr. Stumbo be excluded from every job for which he is qualified. *See also* Bartlett, supra, 226 F.3d at 83; Fjellestad, supra, 188 F.3d at 955. (The ADA "does not require a showing that absolutely no employment opportunities exist.")

In Murphy v. UPS, Inc., supra 527 U.S. 516, 119 S.Ct. 2133, the Supreme Court affirmed the lower court's findings that the plaintiff was not disabled as his impairment only affected his ability to perform his duties as a mechanic when that job requires driving a commercial motor vehicle. Under those facts, the plaintiff was unable to obtain DOT certification required to operate commercial vehicles due to his hypertension. Id., 527 U.S. at 520-23,119 S.Ct. at 2137-39. Similarly, in Sutton v. United Air Lines, Inc., supra, the Supreme Court stated that the plaintiffs' severe

myopic impairment only limited them from holding positions as global airline pilots, but not as pilots for domestic carriers or courier services. Therefore, the plaintiffs failed to demonstrate that their impairment substantially limited them from performing major life activities. Id., 527 U.S. at 491-94, 119 S.Ct. at 2151-52. Here, DynCorp concluded that Mr. Stumbo's impairment (with or without hypertensive medication) precluded him from obtaining any positions with DynCorp. Mr. Stumbo does not narrowly allege that DynCorp's improper determination barred him from a position in Bosnia, but from all possible positions, including Bosnia. Therefore, the United States District Court for the Western District of Virginia is incorrect in holding that Mr. Stumbo's impairment excludes him from only one type of job or a particular job of choice.

The Trial Court found that Mr. Stumbo's ability to secure subsequent employment demonstrates that Mr. Stumbo is not disabled under the meaning of the Act. As previously stated, Mr. Stumbo need not show that all employment opportunities are barred or limited, but that he is significantly restricted from a class of jobs. The field of international law enforcement and security is a narrow field or class of jobs. It is factually not contained within the classification of law enforcement officers or police officers or mall security patrols. Indeed, these job classifications are dissimilar. The class of jobs at issue in this case is a narrow one as confirmed by DynCorp's own published criteria for the position.

Individuals may fall within the ADA's definition of being "regarded as" having a disability when: (1) the covered entity mistakenly believes that person has a physical impairment that substantially

limits one or more major life activities, or (2) the covered entity mistakenly believes that an actual nonlimiting impairment substantially limits one or more major life activities. Sutton, supra, 527 U.S. at 476-77, 119 S.Ct. at 2144. Whether an individual is "regarded as" having a disability "turns on the employer's perception of the employee" and is therefore "a question of intent, not whether the employee has a disability." DeMar, supra, 49 F.Supp.2d at 94 (quoting Francis v. City of Meridan, 129 F.3d 281, 284 (2d Cir. 1998)). Therefore, the focus of the analysis is upon whether the employer knew of the claimant's condition, and if so, whether they believed that it substantially affected his ability in a major life activity. Id. *See also* Daley v. Koch, 892 F.2d 212, 215-16 (2d Cir. 1989); Young v. Bank of Boston Connecticut, 1995 WL 908616 (D.Conn. 1995). (The court held that the defendants regarded the plaintiff's stress-related heart condition, although controlled with medication, impaired his ability to regularly attend work foreclosing success in any position thereby violating the provisions of the ADA.)

Clearly, DynCorp knew of Mr. Stumbo's disability as his hypertensive condition (with or without medication) was the basis for rescinding the offer of employment to Mr. Stumbo. DynCorp's recruiter, Austin Bryan, unilaterally determined that Mr. Stumbo's hypertension rendered him unfit to perform the essential functions of the IPM position. This determination was made based on a cursory review of Mr. Stumbo's medical application by Dr. Peter McDougall who was not provided with correct information regarding IPM job duties or a description of conditions in Bosnia and without the benefit of any

follow-up physical examination or medical evaluation of Mr. Stumbo by DynCorp's physicians. Moreover, DynCorp did not follow its routine procedure to follow up with an additional evaluation.

The adoption of DynCorp's argument by the United States District Court for the Western District of Virginia is problematic: DynCorp asserts that it believed Mr. Stumbo's medical condition rendered him incapable to perform as an IPM but it did not regard Mr. Stumbo as disabled. In support of this circular reasoning, DynCorp cites Mr. Stumbo's current employment and employment history. However, while DynCorp assumed that Mr. Stumbo would not be able to receive medication while stationed in war-torn Bosnia, this same assumption applied to DynCorp's consideration of Mr. Stumbo for any other IPM positions located elsewhere. Therefore, DynCorp's determination regarding Mr. Stumbo's disability cannot be limited to the IPM position in Bosnia alone.

This is similar to the facts in Coleman v. Southern Pacific Transportation Co., 997 F.Supp. 1197 (D.Ariz. 1998). In Coleman, the plaintiff was refused employment as a train crew member (who would be later certified as a locomotive engineer) based on his limited vision. Although the plaintiff lacked vision in one eye, he had good vision and perfect color perception. Defendant claimed that it perceived the plaintiff's monocular vision as substantially limiting his ability to work as a train crew member and locomotive engineer, thereby disqualifying the plaintiff from specific positions only. But the defendant admitted that concerns about the plaintiff's personal safety extended to all jobs within the transportation

class wherein mobile forms of equipment could injure him. The court held that the plaintiff produced sufficient evidence showing that the defendant viewed the plaintiff's impairment as constituting a substantial limitation on his ability to work. Id., at 1205. The court distinguished those facts from Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996) Cert. denied, 519 U.S. 1093 117 S.Ct. 770, 136 L.Ed.2d 715 (1997), stating that the defendant's perception of the plaintiff's impairment (monocular vision) restricted the plaintiff's access to a greater number of jobs than in Bridges, where the plaintiff was disqualified for a firefighting position due to hemophilia. Coleman, 997 F.Supp. at 1205-06.

In this case, DynCorp's perception of Mr. Stumbo's impairment restricted his access to all IPM and related positions. Although DynCorp insists that Mr. Stumbo's medical condition, especially untreated, barred him access to a specific job, in reality, DynCorp's determination precluded Mr. Stumbo from working in an environment such as Bosnia where Mr. Stumbo may encounter difficulty in receiving medication to treat his hypertension and in performing the essential duties. Accordingly, contrary to the decision of the Trial Court, Mr. Stumbo presented an argument that DynCorp regarded him as substantially limited from a life activity.

CONCLUSION

This case presents important questions regarding the judicial interpretation of the definition of classes of employment under the Americans With Disabilities Act, 42 U.S.C. § 2117(a). In addition, this case raises an important question as to whether a

claimant may be treated as disabled when his impairment is correctable through medication. This per se classification by the United States District Court for the Western District of Virginia, which was affirmed by the United States Court of Appeals for the Fourth Circuit, creates a conflict in the circuits. Moreover, this case poses a critical question concerning the judicial interpretation of the Americans With Disabilities Act. It is most significant that the United States Supreme Court clarify whether an employer may discriminate against an employee, and mask that discrimination under the auspices of a generically broad definition of a classification of jobs. For these reasons, review by this Court is warranted. This Court should grant certiorari to review these important matters, reverse the Fourth Circuit's decision and remand the case for a trial of the merits.

Dated: December 4, 2001

Respectfully submitted,

Ann K. Crenshaw
Counsel of Record
Thomas M. Lawson
LAWSON AND SILEK, P.L.C.
P.O. Box 2740
Winchester, VA 22604
Telephone: (540) 665-0050

Counsel for Petitioner

TABLE OF CONTENTS
Appendix to the Petition

Opinion of
United States Court of Appeals
for the Fourth Circuit
entered September 5, 2001 ..... App. 1

Order of
The Honorable Jackson L. Kiser
United States District Court
for the Western District of Virginia
Harrisonburg Division
Re: Granting Defendant's Motion for
Summary Judgment
entered January 29, 2001 ..... App. 4

Memorandum Opinion of
The Honorable Jackson L. Kiser
United States District Court
for the Western District of Virginia
Harrisonburg Division
entered January 29, 2001 ..... App. 5

Determination Letter to
Parties from
U.S. Equal Employment Opportunity Commission
Re: Settlement Agreement
entered July 7, 1998 ..... App. 12

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Entered: September 5, 2001]

No. 01-1196

RICHARD M. STUMBO,
Plaintiff-Appellant,

v.

DYNCORP PROCUREMENT SYSTEMS, INCORPORATED, formerly known as DynCorp Aerospace Operations, Incorporated; DYNCORP AEROSPACE OPERATIONS, INCORPORATED; DYNCORP AEROSPACE OPERATIONS (U.K.), LIMITED,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Virginia, at Harrisonburg.
Jackson L. Kiser, Senior District Judge.
(CA-00-7-5)

Submitted: August 10, 2001
Decided: September 5, 2001

Before WILKINS and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Thomas Moore Lawson, Ann K. Crenshaw, LAWSON & SILEK, P.L.C., Winchester, Virginia, for Appellant. Michelle L. Bodley, Steven W. Ray, Edward Lee Isler, RAY & ISLER, P.C., Vienna, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Richard M. Stumbo appeals the district court's order granting the Defendants' motion for summary judgment on Stumbo's Americans with Disabilities Act (ADA) claim. See 42 U.S.C.A. §§ 12101-12213 (West 1995 & Supp. 2000). We affirm.

The only question on appeal is whether Stumbo forecast sufficient evidence that Defendants regarded him as disabled to survive a motion for summary judgment. Applying the Supreme Court's decisions in Sutton v. United Airlines, 527 U.S. 471 (1999), and Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999), we conclude that he did not. Stumbo has demonstrated only that Defendants considered him unfit for one particular job. See Sutton, 527 U.S. at 492 (stating that to make out an ADA claim, a person must be regarded as "precluded from a broad range of jobs"); Murphy, 527 U.S. at 523 (holding that "to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job").

Accordingly, we affirm the grant of summary judgment in the Defendants' favor. We dispense with oral argument because the facts and legal contentions are adequately represented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

[Entered: January 29, 2001]

RICHARD STUMBO,	)	
	)	**Case No. 5:00CV0007**
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
DYNCORP TECHNOLOGY	)	
SERVICES, INC.,	)	**By: Jackson L. Kiser**
	)	**Senior United States**
Defendant.	)	**District Judge**
	)	

Before the Court is Defendant's Motion for Summary Judgment on all three claims in Plaintiff's suit under the American with Disabilities Act, 42 U.S.C. § 12101, *et seq.* For the reasons stated in the attached Memorandum Opinion, I **GRANT** Defendant's Motion in its entirety.

The Clerk is directed to send certified copies of this Order to all counsel of record. Any pending motions are to be dismissed as moot and the clerk is directed to strike this case from the docket.

Entered this 29th day of January, 2001.

/s/_____
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

[Entered: January 29, 2001]

RICHARD STUMBO,	)	
	)	**Case No. 5:00CV0007**
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM**
	)	**OPINION**
	)	
DYNCORP TECHNOLOGY	)	
SERVICES, INC.,	)	**By: Jackson L. Kiser**
	)	**Senior United States**
Defendant.	)	**District Judge**
	)	

In 1990, Plaintiff Richard Stumbo ("Stumbo") retired from his twenty-one year employment as a police officer. A year later, Stumbo was diagnosed with high blood pressure, which has since been treated with medication without incident. Stumbo has experienced no physical limitations due to his high blood pressure. Over the past decade, he has held an assortment of investigative and / or security positions around the world. These positions have often been quite strenuous, frequently requiring Stumbo to work between fourteen and sixteen-hour days for months at a time.

In early-1996, Defendant Dyncorp Technology Services, Inc.[1] ("Dyncorp") secured a contract with the U.S. Department of State to provide International Police Monitors ("IPMs") in Bosnia as part of United Nations operations in that region. The United Nations, not Dyncorp, determined both the geographic region to which an IPM would be assigned and the duties he would perform. In Bosnia, the terrain is mountainous; obtaining transportation is difficult; the availability of running water, refrigeration, and electricity are erratic; and food supplies are limited.

In April 1996, Stumbo submitted a resume to Dyncorp in reference to the IPM position. On August 12, 1996, Dyncorp conditionally accepted Stumbo's application, so long as he satisfactorily complete a medical examination and return various informational forms. Within a week, Stumbo had his physician, Dr. Mark Vickers ("Vickers"), perform a physical examination. On the medical examination form, Vickers classified Stumbo as "fit for all physical and manual duties" and prescribed Stumbo six months of medication for his hypertension.

As a course of practice, Dyncorp referred Stumbo's medical records to Peter McDougall ("McDougall"), Ph.D., for review of the medical examination. Dyncorp undertook this additional screening process in response to questions from its employer regarding the physical fitness of the some of

---

[1] The names of Defendant are rather slippery in this case. Plaintiff apparently names a fictitious entity in the Complaint and Defendant itself has changed its name in the past few years. Regardless, the correct entity is Dyncorp Technology Services, which will be referred simply as "Dyncorp" throughout this opinion.

the IPMs. Although no additional examination was undertaken, Dr. McDougall concluded upon reviewing Stumbo's examination: "Overweight smoker on two hypertensive meds. Wouldn't recommend for strenuous work." After receiving this note, Dyncorp informed Stumbo on September 9, 1996 that he would not be hired as an IPM in Bosnia. In discovery, Dr. McDougall today contends that, if he were to re-examine Stumbo's application today, he would not make any comment regarding the hypertensive condition whatsoever.

Stumbo filed a Complaint with the Equal Employment Opportunity Commission in early 1997. On July 7, 1998, the EEOC issued its Determination. Plaintiff subsequently brought a suit under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), alleging three claims: that he was subjected to discrimination on the basis of disability, § 12102(2)(A); that Defendant improperly regarded him as disabled, § 12102(2)(C); and that Defendant failed to provide a reasonable accommodation for the hypertension, § 12112(b). Defendant has moved for summary judgment on all counts. In light of the recent guidance from the United States Supreme Court in *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999), I find for Defendant and grant the Motion in its entirety.

Legal Standard

Summary judgment is appropriate where no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of a material

fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. In making this determination, "the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party." *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994) (citations omitted), *cert. denied*, 513 U.S. 813 (1994); *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1129 (4th Cir. 1987). Nevertheless, where the record taken as a whole cannot lead a rational trier of fact to find for the nonmoving party, then no genuine issue exists for trial and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Discussion

Each of Plaintiff's three claims is flawed. Turning to the first, the claim of disability under § 12102(2)(A), Plaintiff has the burden of proving that he possesses "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." § 12102(2)(A). Plaintiff's failure to make any such showing is fatal to his first claim.

In making this determination, I note that the facts and legal analysis of this matter are quite analogous to those in *Sutton*, 527 U.S. 471, and virtually identical to those in *Murphy*, 527 U.S. 516. In *Murphy*, a hypertensive mechanic was dismissed from his job because of his high blood pressure. It is important to note that the hypertension of the Plaintiff in *Murphy*, just as that of the Plaintiff in this matter, was correctable via medication. In both *Murphy* and *Sutton*,

the Court took into account the effect of "taking measures to correct for, or mitigate, a physical or mental impairment...when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." *Id.* The Court in *Murphy* thus affirmed summary judgment because the correctably hypertensive Plaintiff was unable to prove as a matter of law that he "is substantially limited in one or more major life activities and thus disabled under the ADA." *Murphy*, 527 U.S. at 521; *cf. Sutton*, 527 U.S. at 482 (dealing with correctable myopia).

The clear indication from these cases is that Plaintiff Stumbo's claim under § 12102(2)(A) is unsustainable as a matter of law. In this case, Stumbo's hypertension is fully correctable; he is not precluded from any of life's major activities, not even working. Plaintiff adduces no evidence that he cannot participate in the major lifetime activity of working: he only demonstrates that he was not hired to be an IPM by Defendant. Indeed, he has had many different jobs related to security and protection while he has had the hypertensive condition. As such, I find that Plaintiff does not possess a disability as contemplated under § 12102(2)(A).

Turning to Plaintiff's second claim, that Defendant "regarded him as disable" in contravention of § 12102(2)(C), I find this issue also to be largely resolved by the opinions in *Murphy* and *Sutton*. To be regarded as substantially limited in the major life activity of working, Plaintiff must demonstrate that he is disabled and unable to perform a *class* of jobs. "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 CFR § 1630.2(j)(3)(i); *Murphy*,

527 U.S. 523. There is no evidence that Defendant did not regard Plaintiff as able to work in any such class of jobs - Dyncorp merely found Plaintiff unable to work as an IPM in the war-torn region of Bosnia.[2] Indeed, in oral argument, counsel for Dyncorp expressed to the Court the firm's confidence that Plaintiff would make a fine police monitor, policeman, security guard, and so forth in any region but Bosnia. Stumbo's employment history corroborates this finding, as he continued to participate in the field of security monitoring and police work for several years after his diagnosis with hypertension. As such, Plaintiff fails to demonstrate as a matter of law that Defendant regarded him as having a disability that limited him in any life activity. Accordingly, the claim under § 12102(2)(C) necessarily fails.

Lastly, Plaintiff's accommodation claim fails because he cannot demonstrate that he is "an otherwise qualified individual with a disability" under the ADA. Moreover, I cannot conceive of any reasonable manner by which Defendant could have accommodated the working conditions of Bosnia to the medical needs of the Plaintiff. *Myers v. Hose*, 50 F.3d 278, 280-82 (discussing the need for practicality in adapting work

---

[2] Plaintiff contends that the proper class of jobs in his case is that of IPM. Much as the Supreme Court did in *Murphy* and *Sutton*, I reject this exceedingly narrow classification. The *Sutton* Court found global airline pilot not to constitute the proper class of job, but rather to be in the same classification as regional airline pilot and pilot instructor. *Sutton*, 527 U.S. at 493. Similarly, the Murphy Court found mechanic to be in the same job classification as gas-engine repairer and gas-welding equipment mechanic, among others. *Murphy*, 527 U.S. at 524-25. Following that precedent, I find many other jobs, such as security monitoring and investigatory work, also to utilize Plaintiff's specialized skills.

environments). In other words, Stumbo has not demonstrated any disability triggering the ADA's requirement of accommodation; nor has he shown any possible means of accommodation. As such, the failure to accommodate claim necessarily fails. See *Shiflett v. GE Fanuc Automation Corp.*, 960 F. Supp. 1022 (W.D. Va. 1993).[3]

Conclusion

Plaintiff's case fails legally in all regards. The initial problem is the lack of any disability under the ADA, as his condition is correctable via medication. Moreover, Plaintiff puts forth no evidence that Defendant regarded him as substantially limited from a life activity. Lastly, Plaintiff shows no need, nor reasonable means, for accommodation by Defendant. As such, I grant Defendant's Motion for Summary Judgment as to all of Plaintiff's claims.

Entered this 29th day of January, 2001.

/s/_____
Senior United States District Judge

---

[3] I also note that the record indicates that Plaintiff also was apparently neglectful in requesting accommodation. *See* 29 CFR § 1630.9; *Tangires v. The Johns Hopkins Hosp.*, 79 F. Supp.2d 587, 597 (D. Md. 2000).

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Dallas District Office

[Entered: July, 7, 1998]

207 S. Houston Street
Dallas, TX 75202-4726
PH: (214) 655-3355
TDD (214) 655-3363
FAX (214) 655-3443

CHARGE NO: 310 97 1107

Mr. Richard M. Stumbo — **Charging Party**
M. W. Kellog
6458/DZBH
Post Office Box 4522
Houston, TX 77210-4522

DynCorp — **Respondent**
2000 Edmund Halley Dr.
Reston VA 20191-3436

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title I of the Americans with Disabilities Act (ADA) of 1990.

All requirements for coverage have been met. Charging Party alleged that he was discriminated against in violation of the statute in that Respondent withdrew the offer of a position as police monitor after Respondent reviewed his medial documents.

Respondent provides technical services to the United States and foreign government agencies and commercial customer worldwide. The evidence shows that in March 1996, Charging Party applied for the position of police monitor in Bosnia. On March 30, 1996, Respondent requested and Charging Party submitted biographical data. On August 12, 1996, Respondent notified Charging Party by telephone that he had the police monitor position, and that he was going to Bosnia. Charging Party was told his leave date was August 21, 1996, and that a preemployment package was being Federal Expressed. Charging Party completed all the forms, including a physical examination form completed by his doctor and returned them to Respondent. Charging Party was notified his leave date was moved to September 16, 1996, due to the Bosnia election.

On September 6, 1996, Respondent called Charging Party to tell him there was a problem with his physical examination, and requested that Charging Party contact them on September 9, 1996, concerning the problem with his physical examination. On September 9, 1996, Charging Party was told he was rejected for the police monitor position, because he had high blood pressure and hypertension.

Respondent contends that individuals recruited and hired as police monitors are governed by the terms of a foreign service employment agreement signed by all hires. Respondent states that the State Department regulations required all personnel to submit to a pre-employment screening process that insures they are in excellent physical and mental condition. One of the qualifications listed for hire is that Police Monitors must be in "good physical and mental condition with

no health deficiencies, either temporary or permanent". Respondent asserts that Charging Party was ground to be medically incapable of performing in the position of police monitor based on the assignment of individuals in a country ravaged by war, and job requirements for the position of police monitor.

The evidence shows that the U.S. State Department lists as one of the qualifications that police monitors must be in "good physical and mental condition with no health deficiencies, either temporary or permanent". The Respondent cannot defend its discriminatory practice by referring to the State Department's list of qualifications, since such requirements do not rise to the level of federal law.

The Evidence shows Respondent withdrew the offer of a police monitor position, because Respondent found Charging Party to be medically incapable of performing after a review of Charging Party's medical documents revealed Charging Party had hypertension, but Charging Party was given medical clearance by his doctor for the assignment in Bosnia.

Respondent concluded Charging party was found to be medically incapable of performing because Charging Party has hypertension, and withdrew the offer of employment. Respondent never requested a medical examination by its doctor. Charging Party's doctor concluded from his medical examination that Charging Party was medically capable of performing the job of police monitor. Respondent perceived Charging Party to be substantially limited in his ability to perform the duties of police monitor because of his impairment, and thus placed Charging Party in the category of an individual who did not meet the minimum qualifications set out in its contract with the U.S. State Department.

29 C.F.R. Section 1630.6 prohibits an employer from participating in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by the statute.

Accordingly, there is reasonable cause to believe Respondent discriminated against Charging Party in violation of the ADA, by failing or refusing to hire Charging Party because of his record of disability, or because he was regarded as a person with a disability.

Section 107 of Title I of the Americans with Disabilities Act requires that if the Commission determines there is reasonable cause to believe that the charge is true, it shall endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Having determined there is reasonable cause to believe the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the near future to begin the conciliation process. Disclosure of information obtained by the Commission during the conciliation process with be made in accordance with Section 107 of Title I and Section 1601.26 of the Commission's Procedural Regulations. If the Respondent declines to enter into settlement discussions, or if the Commission's representative for any other reason is unable to secure a settlement acceptable to the Commission, the Director shall so inform the parties in writing and advise them of the court enforcement procedures available to the Charging Party and the Commission.

On Behalf of the Commission

07-07-98 /s/ _____

Date Jacqueline R. Bradley
District Director